



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Police Officer John Restaino : ORDER
Tax Registry No. 902270 : OF
Bronx Court Section : DISMISSAL
-----X

Police Officer John Restaino, Tax Registry No. 902270, having been served with written notice, has been tried on written Charges and Specifications numbered 2021-23551 & 2021-23645, as set forth on form P.D. 468-121, dated June 24 and 30, 2021 respectively, and after a review of the entire record, Respondent is found Guilty under Case No. 2021-23645, and under Case No. 2021-23551, Respondent is found Guilty on Counts 1, 2, 3, 5, 6, 7, 9, 11, and 13, and Not Guilty on counts 4, 8, 10, 12, and 14.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer John Restaino from the Police Service of the City of New York.

DERMOT F. SHEA
POLICE COMMISSIONER

EFFECTIVE: 7/20/21

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POLICE DEPARTMENT

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In the Matter of the Charges and Specifications	:	Case Nos.
- against -	:	2021-23551
Police Officer John Restaino	:	2021-23645
Tax Registry No. 902270	:	
Bronx Court Section	:	

-----X

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Javier Seymore, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2021-23551

1. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between March 17, 2019 and January 11, 2021, in Kings County, failed and neglected to properly handle approximately thirteen (13) motor vehicle accidents by not following DARP procedures and improperly steered motor vehicles to individual tow operators and companies known to the Department.
P.G. 217-09 DIRECTED ACCIDENT
A.G. 304-06, Page 3, Paragraph 22 RESPONSE PROGRAM (D.A.R.P.)
PROHIBITED CONDUCT
2. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between March 17, 2019 and March 24, 2021, in Kings County, failed and neglected to properly handle approximately fourteen (14) blocked driveway tow jobs by not following the Driveway Tow Program procedures and improperly steered motor vehicles to individual tow operators and companies known to the Department.
P.G. 214-14 DRIVEWAY TOW PROGRAM
P.G. 218-21 ROTATION TOW
A.G. 304-06, Page 3, Paragraph 22 PROHIBITED CONDUCT
3. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between April 8, 2019 and March 20, 2020, in Kings County, failed and neglected to properly handle one (1) 10-68 radio runs, two (2) vehicle stops, and two (2) vehicle parking summonses involving a motor vehicle by improperly steering motor vehicles to individual tow operators and companies known to the Department.
P.G. 209-07 PARKING SUMMONSES –
A.G. 304-06, Page 3, Paragraph 22 GENERAL PROCEDURE
PROHIBITED CONDUCT
4. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between July 15, 2020 and January 11, 2021, in Kings County, did knowingly associate with a person or organization reasonably believed to be engaged in, likely to engage in, or to have engaged in criminal activities.
P.G. 203-10, Page 1, Paragraph 2 PUBLIC CONTACT –
PROHIBITED CONDUCT
5. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between March 2, 2018 and February 10, 2021, in the Kings County, did improperly utilize a Department computer to conduct computer inquiries in the Department's database on seven (7) separate occasions which were not related to said Police Officer's assignment. *(As amended.)*
P.G. 219-14, Page 1, Paragraph 2 DEPARTMENT COMPUTER
SYSTEM

6. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between January 1, 2016 and June 30, 2021, in the Kings County, wrongfully resided in the confines of his assignment.

P.G. 203-18

RESIDENCE REQUIREMENTS

7. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between March 7, 2020 and January 11, 2021, did wrongfully smoke cigars on approximately seven (7) occasions while in uniform on patrol and/or inside a Department vehicle.

P.G. 203-10, Page 2, Paragraph 14

PUBLIC CONTACT –
PROHIBITED CONDUCT

8. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between March 17, 2019 and March 24, 2021, in Kings County, did knowingly associate on approximately thirty-two (32) occasions with persons and/or organizations reasonably believed to be engaged in criminal activities, to wit: said Police Officer repeatedly made calls on his personal cellular telephones to numerous unsolicited tow truck operators and companies to facilitate the removal of motor vehicles by the unsolicited tow trucks thereby circumventing established DARP, Driveway Tow Program, and Rotation Tow procedures.

NYC Administrative Code Sections
20-518(b) and 20-518(b)(2)

UNSOLICITED RESPONSE BY
TOW OPERATOR

9. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about January 11, 2021, in Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer made inaccurate and false entries on a Police Accident Report regarding tow companies that removed vehicles from the scene.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

10. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between October 9, 2019 and March 24, 2021, in Kings County, on fourteen (14) occasions, failed and neglected to render all necessary police service in assigned area and as otherwise directed.

P.G. 202-01, Page 1, Paragraph 9

POLICE OFFICER – DUTIES
AND RESPONSIBILITIES

11. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between July 13, 2020 and June 19, 2021, in Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer obstructed his front and/or rear license plates on his personal vehicle on approximately fifty (50) occasions, and operated said vehicle on public roadways.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

NYS VTL 402(B)

12. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between March 20, 2020 and March 24, 2021, in Kings County, failed to take police action against unlicensed tow trucks while present at the scene of multiple vehicle accidents and incidents involving motor vehicles requiring a tow truck whereby unlicensed tow trucks were present.

P.G. 209-28

P.G. 209-29

P.G. 209-34

UNLICENSED TOW TRUCK
OPERATORS
SEIZURE OF UNLICENSED TOW
TRUCKS
TOW TRUCK ENFORCEMENT/
COMMON SUMMONSABLE
OFFENSES

13. Said Police Officer John Restaino, while assigned to 83rd Precinct, while on-duty, on or about and between May 1, 2020 and January 12, 2021, in Kings County, failed to take police action with respect to the Rotation Tow procedure on two (2) occasions regarding an unregistered vehicle and an abandoned vehicle obstructing a fire hydrant.

P.G. 218-21

ROTATION TOW

14. Said Police Officer John Restaino, while assigned to 83rd Precinct, while off-duty, on or about November 2, 2016, New York, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer completed a Uniform Residential Loan Application for a property he later purchased in Highland Lakes, New Jersey, and in the application noted the property would be a primary residence and that he intended to occupy the property as a primary residence, which was not true.

P.G. 203-10 Page 1, Paragraph 5

Title 18, United States Code, Section 1001

PUBLIC CONTACT –
PROHIBITED CONDUCT
STATEMENT OR ENTRIES
GENERALLY

Disciplinary Case No. 2021-23645

1. Said Police Officer John Restaino, while assigned to the 83rd Precinct, while on-duty, on or about January 31, 2021, in Kings County, wrongfully used force, to wit, said Police Officer placed his foot on the head and knee on the shoulder area to an individual known to the Department without police necessity.

P.G. 221-01

P.G. 221-02, Page 1, Paragraph 11

FORCE GUIDELINES
USE OF FORCE

2. Said Police Officer John Restaino, while assigned to the 83rd Precinct, while on-duty, on or about January 31, 2021, in Kings County, improperly used his body-worn camera, to wit, said Police Officer failed to timely activate his body-worn camera during police action.

P.G. 212-123

USE OF BODY-WORN CAMERAS
COMMAND OPERATIONS

3. Said Police Officer John Restaino, while assigned to the 83rd Precinct, while on-duty, on or about January 31, 2021, in Kings County, failed to prepare a Threat, Resistance, or Injury Report as required.

P.G. 221-03

REPORTING AND
INVESTIGATION OF FORCE
INCIDENT OR INJURY TO
PERSONS DURING POLICE
ACTION
TACTICAL OPERATIONS

4. Said Police Officer John Restaino, while assigned to the 83rd Precinct, while on-duty, on or about January 31, 2021, in Kings County, did fail and neglect to make Digital Activity Log entries, as required.

P.G. 212-08

ACTIVITY LOGS

5. Said Police Officer John Restaino, while assigned to the 83rd Precinct, while on-duty, on or about January 31, 2021, in Kings County, did wrongfully smoke a cigar while in uniform.

P.G. 203-10, Page 2, Paragraph 14

PUBLIC CONTACT –
PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 12 and 13, 2021. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeant Christopher Morano and Sergeant Jeremy Orenstein as witnesses, and introduced Body-Cam footage of an arrest incident. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find as follows:

Case No. 2021-23645 (force case):

Specification 1 (excessive force): Guilty

Specification 2 (Body-Worn Camera): Guilty

Specification 3 (TRI Report): Guilty

Specification 4 (Activity Log): Guilty

Specification 5 (cigar): Guilty

Case No. 2021-23551 (Tow case):

- Specification 1 (accident tows): Guilty
- Specification 2 (driveway tows): Guilty
- Specification 3 (additional tows): Guilty
- Specification 4 (criminal association): Not Guilty
- Specification 5 (computer inquiries): Guilty
- Specification 6 (residence): Guilty
- Specification 7 (cigars): Guilty
- Specification 8 (association): Not Guilty
- Specification 9 (false entries): Guilty
- Specification 10 (fail to render service): Not Guilty
- Specification 11 (obstructed plates): Guilty
- Specification 12 (failed to act): Not Guilty
- Specification 13 (failed to tow): Guilty
- Specification 14 (false loan application) Not Guilty

Recommended penalty: DISMISSAL from the New York City Police Department.

ANALYSIS

Respondent faces charges on two separate matters. *Case No. 2021-23645* involves an allegation of excessive force during an arrest, and related charges. *Case No. 2021-23551* centers on charges that Respondent repeatedly disregarded Department tow procedures by privately arranging for tow companies to respond to tow jobs. These two matters will be considered separately.

Case No. 2012-23645 (force case)

It is alleged that on January 31, 2021, during an arrest in Kings County, Respondent used excessive force against an individual ("the arrestee") by placing his foot on the arrestee's head, and his knee on the arrestee's shoulder area. The arrestee did not appear to testify; instead, the Department Advocate presented footage from the Body-Worn Camera ("BWC") of one of the other officers at the scene, as well as the testimony of the IAB investigator.

Sergeant Christopher Morano, of IAB Group 54, testified that this matter had been self-reported to IAB by the 83 Precinct because the arrest had involved the use of force, including the deployment of a Conducted Electrical Weapon ("CEW"). According to the sergeant's investigation, the arrestee was being apprehended for having just stabbed another individual in the torso. After a show-up identification procedure was conducted, the four officers on the scene, including Respondent, attempted to place the arrestee in handcuffs. The struggle to take control of the arrestee, who was actively resisting, was captured by the BWC footage of one of the officers involved in the apprehension. (Tr. 29, 31-36, 46-50)

In that footage (Dept. Ex. 1), the arrestee is identified as the assailant, at which point the officers instruct him to turn around and put his hands behind his back. The arrestee immediately resists, turning his body away, swinging his arms at the officers, and screaming at them. One of the officers uses a CEW to bring the arrestee to the ground, but the arrestee continues to struggle with the officers, ignoring their instructions. At the 3:55 mark of the video, Respondent can be seen stepping on the arrestee's right arm to try to control him. At 4:37, the arrestee is turned on his side, and Respondent appears to place his left foot on the arrestee's head for about 20 seconds, as the arrestee complains, "You're attacking my head." The struggle to handcuff the arrestee continues, as he twists his body away from the officers. At 5:12, with the arrestee's body in a prone position, Respondent kneels down and places his knee on the shoulder area of

the arrestee, while reaching with his hand to help secure the arrestee's arm. It appears that the arrestee finally is handcuffed at about 5:30, though Respondent remains with his knee on the arrestee for an additional 30 seconds before standing up. About two minutes later, Respondent can be seen retrieving a cigar from an EMS worker on the scene, which Respondent holds in his right hand. (Dept. Ex. 1; Tr. 35-41)

Respondent testified that the stab victim identified his assailant, who was someone that Respondent knew from the neighborhood as a "paranoid, hyper" individual who frequently was involved in disputes with neighbors. Respondent located the individual and lured him to a more secure location in order to conduct an identification procedure. After he was identified, the arrestee "flipped out," refusing to be handcuffed. He punched at one of the officers, and had to be tased to get him to the ground. The arrestee was kicking and screaming, and refused to place his hands behind his back. Respondent grabbed the arrestee's shoulders in an effort to gain control, but the arrestee continued to fight the officers. (Tr. 241-46)

Since Respondent was feeling the lingering effects of a shoulder injury he had sustained two months earlier, he believed his legs were stronger than his arm, and so he stood up and stepped on the arrestee's arm to gain control. The arrestee rolled over, and Respondent stepped on top of his shoulder. Respondent testified that he did not step on the arrestee's head. Respondent then placed his knee in the area of the arrestee's shoulder in order to get the arrestee's arms secured so he could be handcuffed. (Tr. 246-49, 291-95)

Specification 1 charges Respondent with using excessive force against the arrestee. Section 221-01 of the Patrol Guide states that force may be used "when it is reasonable to place a person in custody." However, "if the force used is unreasonable under the circumstances, it will be deemed excessive and in violation of Department policy."

Here, the charge specifies two parts of the incident, alleging that Respondent wrongfully placed his foot on the arrestee's head, and his knee on the arrestee's shoulder area. At about the 5:12 mark of the video, Respondent can, indeed, be seen with his knee on the shoulder area of the arrestee. At the same time, Respondent is reaching with his right hand in an effort to gain control of the arrestee's arm, which remains uncuffed. It is troubling, however, that Respondent remains with his knee on the arrestee even after it appears that both of the arrestee's hands have successfully been placed in handcuffs. With multiple officers on the scene, and the arrestee secured, Respondent continues to place his knee on the arrestee's shoulder, even after the officers have already gained control of the suspect, which was unnecessary.

Of even greater concern is the manner in which Respondent, while standing, places his foot on the arrestee's head for an extended period of time. Respondent claimed that he actually placed his foot on the arrestee's shoulder-blade, but the video footage shows otherwise. Beginning about the 4:37 mark, Respondent appears to have his foot placed on the arrestee's head. The arrestee repeatedly cries out, "You're attacking my head." Respondent holds his foot in that position for approximately 20 seconds. That action on the part of Respondent was excessive and unacceptable, and did not constitute a reasonable use of force under the circumstances.

On the one hand, this court is mindful that the officers were trying to gain control of an actively resisting suspect, who was being taken into custody for allegedly stabbing another individual. Toward that end, a reasonable amount of force was justified in order to securely handcuff the arrestee. However, Respondent's actions here went beyond what was reasonable under the circumstances. Accordingly, I find Respondent guilty of Specification 1.

Specification 2 charges Respondent with failing to timely activate his Body-Worn Camera. Section 212-123 of the Patrol Guide requires a UMOS to activate his camera prior to

engaging in an arrest. Sergeant Morano testified that Respondent did not activate his camera until after the incident. (Tr. 44) Respondent confirmed that he did not turn on his camera, explaining that he just reacted to the situation and jumped in. (Tr. 250, 290) The credible evidence has established that Respondent failed to timely activate his BWC during the police action in this case, and I find him guilty of Specification 2.

Specification 3 charges Respondent with failing to prepare a Threat, Resistance, or Injury Report (TRI) as required. Section 221-03 of the Patrol Guide requires an MOS involved in a use of force incident to complete a TRI. Here, Sergeant Morano testified that Respondent did not prepare a TRI following this incident. (Tr. 41-42) Respondent confirmed that he did not prepare the report, explaining that he was not the arresting officer, and so he did not believe it was necessary to do so. (Tr. 251, 290) However, since Respondent, himself, was involved in using force during the apprehension, he was required to prepare a TRI. This he failed to do, and I find him guilty of Specification 3.

Specification 4 charges Respondent with failing to make Digital Activity Log entries about the incident as required. Section 212-08 of the Patrol Guide requires UMOS to record their daily activities in the digital Activity Log application on their Department smartphone. Sergeant Morano testified that Respondent did not make any entries regarding this incident, and Respondent confirmed that he did not do so, explaining that he struggled using the electronic activity log, and he believed the entries made by the recorder were sufficient to cover the incident. (Tr. 43-44, 251-52, 290-91) However, since Respondent was actively involved in the apprehension, he, himself, was also responsible for documenting the incident in his Activity Log. Since he failed to do so, I find him guilty of Specification 4.

Specification 5 charges Respondent with wrongfully smoking a cigar while in uniform, contrary to Section 203-10 (14) of the Patrol Guide, which prohibits "smoking in public view

while in uniform.” In the video footage, Respondent can be seen, on the street, holding a cigar that is handed to him by an EMS worker. Respondent admitted that he smoked the cigar, as he often has done since childhood, and no supervisor had ever instructed him not to do so. (Tr. 252-53, 291) Accordingly, I find Respondent guilty of Specification 5.

Case No. 2021-23551 (tow case)

This matter focuses on charges that Respondent repeatedly violated the Department’s tow procedures beginning in March 2019. Sergeant Jeremy Orenstein, of IAB Group 25, testified that he was assigned as lead investigator on this case in late March 2020. During an unrelated investigation into thefts of packages in Queens, a car that was suspected of being used during the thefts was summonsed in Brooklyn by Respondent and his partner. The officers’ BWC footage was reviewed to see if there was evidence of value for the theft investigation. During that review, it was observed that Respondent used his personal phone to call a tow company for the vehicle, in violation of the Department’s tow procedures. Based on these observations, IAB began an investigation into Respondent regarding improper tow steering. (Tr. 60-64, 69-70, 151-52)

As a result of that investigation, Respondent now faces multiple charges of misconduct. These charges will be considered separately.

Specification 1 charges Respondent with mishandling 13 motor vehicle accidents by not following procedures set forth in the Department’s Directed Accident Response Program (“DARP”), in that he improperly steered accident vehicles to individual tow operators. The DARP procedures, as set forth in section 217-09 of the Patrol Guide, require an MOS to notify the Communications Section dispatcher when towing service is needed. The DARP operator will then notify a participating tow company, “on a strict rotation basis.”

Sergeant Orenstein testified that through IAB's investigation, which included surveillance, integrity tests, and review of reports, it was determined that Respondent repeatedly violated DARP procedures by failing to call Central to have a tow operator respond to accident locations. Instead, Respondent, on his own, called specific tow companies to handle the vehicles at the accident scenes. Respondent primarily used two such companies: "Downtown Automotive" and "Guido's." Sergeant Orenstein conceded that there was no indication that Respondent received any monetary benefit from referring the tow jobs to these particular companies. (Tr. 71-74, 78-79, 82-85, 88, 162, 164)

Respondent testified that he did, in fact, call these tow companies directly, rather than follow the DARP procedures, with which he was familiar. He explained that from his experience, there often were long waits when he called Central to have them assign a tow operator, and so he tried to avoid those delays by calling companies that he knew he could rely upon. With respect to Downtown Automotive, Respondent knew one of the owners as a reliable tow operator since the 1990's. According to Respondent, both Guido's and Downtown Automotive were registered with the DARP program, one from Respondent's precinct, and one from an adjoining precinct. Respondent insisted that he never received any compensation of any kind for calling these tow operators. (Tr. 254-56, 264, 296-98)

Notwithstanding his stated intentions, Respondent's actions plainly ran afoul of the DARP procedures. Respondent acknowledged that he was familiar with these procedures, and chose to circumvent them anyway. Accordingly, I find Respondent guilty of Specification 1.

Specification 2 charges Respondent with mishandling 14 "blocked driveway" tow jobs by not following the Department's Driveway Tow Program procedures, in that he improperly steered vehicles to tow operators. Section 214-14 of the Patrol Guide sets forth the Driveway Tow Program. Where a vehicle needs to be towed because it is blocking a driveway, and the

property owner requests the assistance of the police in having the vehicle removed, an MOS will follow the Rotation Tow procedures contained in Section 218-21 of the Patrol Guide.

Specifically, the officer must provide the relevant information to the precinct's desk officer, who will then contact the next participating tow operator in rotation sequence.

Sergeant Orenstein testified that his investigation similarly revealed that Respondent repeatedly called tow operators directly to have them deal with vehicles that were blocking driveways. (Tr. 88-90, 167-68) Respondent, himself, admitted to doing so. He testified that it often was difficult to find companies willing to tow such vehicles, so he called directly to companies that he knew would handle the jobs. Respondent reiterated that his only goal was to expedite the clearing of the driveways, and that he did not receive any compensation for doing so. (Tr. 256-59, 264, 297)

Again, even if his intentions were to expedite the tows, the record has established that Respondent repeatedly disregarded the relevant patrol guide procedures by calling tow operators directly. Accordingly, I find him guilty of Specification 2.

Specification 3 charges Respondent with mishandling several additional vehicle situations, in that he again improperly steered the vehicles to individual tow companies. Specifically, Sergeant Orenstein testified that his investigation revealed the following:

- a. On April 8, 2019, Respondent responded to a location and improperly arranged to have a vehicle towed by a tow operator he called.
- b. On March 7, 2020, during a car stop, Respondent improperly called a tow operator to have the vehicle towed.
- c. On March 20, 2020, during a car stop in which summonses were issued, Respondent improperly called a tow operator to have the vehicle towed; the tow operator arrived, and drove the vehicle from the scene himself.

- d. On June 21, 2019, after issuing parking summonses to a vehicle, Respondent improperly called for a tow operator.
- e. On December 10, 2019, after issuing a summons to a double-parked vehicle, Respondent improperly called a tow operator to have the vehicle towed.

(Tr. 92-103, 169-70)

In his testimony, Respondent admitted to making the calls to the tow operators in each of the above five cases, again explaining that he called tow operators on whom he could rely to do the jobs efficiently. (Tr. 259-60, 297) Accordingly, I find Respondent guilty of Specification 3.

Specification 4 charges Respondent with criminal association. Section 203-10 (2) of the Patrol Guide prohibits an MOS from knowingly associating with any person or organization reasonably believed to be engaged in, likely to engage in, or to have previously engaged in criminal activities.

Sergeant Orenstein testified that his investigation into Downtown Automotive, one of the tow companies regularly used by Respondent, revealed that one of the owners involved in that company had two prior felony convictions: in 2012, he was convicted of felony possession of marijuana, a Class C felony, and in 2006, he was convicted of conspiracy, an E felony. Sergeant Orenstein conceded, however, that there was no indication that Respondent was aware of these convictions. (Tr. 85-86, 111-13, 172-74)

Additionally, Sergeant Orenstein testified regarding an integrity test that occurred on July 1, 2020. An undercover officer pretending to be a motorist, needed to have his vehicle towed. The car at issue was "beat up," valued at less than \$1,000.00. Respondent had the vehicle towed by Downtown Automotive. Several days later, the motorist contacted Respondent to tell him that his car had been junked. Respondent called Downtown Automotive, and was told that since

the motorist had not appeared to claim the car and pay the fees, the car had been scrapped.

Respondent then called back to the motorist and explained to him what happened; he told the motorist that if he wanted to pursue the matter, he could bring a civil action. (Tr. 104-10, 174-84)

Respondent confirmed that the above sequence of events did occur. He testified that he genuinely did not believe there had been any criminal conduct involved, and if the motorist wished to take action against the tow company for junking his vehicle, it would be through a civil action. (Tr. 264-69, 298-301)

It is the Advocate's position that the actions by Downtown Automotive were clearly criminal in nature, and that Respondent, therefore, should have avoided any further association with that company and its owners. However, I credit Respondent's explanation that he did not believe that there was any criminal activity involved in this incident. The vehicle was in poor shape, and when the motorist did not appear to reclaim it, the car was scrapped. Under the circumstances, it was not unreasonable for Respondent to conclude that the motorist's recourse here, if any, was a civil action. Also, there was no indication that Respondent was aware of the prior convictions of the owner from Downtown Automotive; Sergeant Orenstein conceded as much. The record has failed to establish, by a preponderance of the credible evidence, that Respondent knowingly associated with a person or organization reasonably believed to be engaged in, likely to engage in, or to have previously engaged in criminal activities. Accordingly, I find Respondent not guilty of Specification 4.

Specification 5 charges Respondent with conducting seven computer inquiries in the Department's database which were not related to Respondent's assignment. Section 219-14 of the Patrol Guide, entitled "Department Computer Systems," states that an MOS may only make official inquiries which relate to official business of the Department.

Here, Sergeant Orenstein testified that a computer audit revealed that Respondent misused the computer database on seven occasions since January, 2020. For instance, Respondent ran checks on a number of individuals, including his friends. (Tr. 113-17, 184-89) In his testimony, Respondent admitted to making these computer inquiries, even though they were not official cases to which he was assigned. He explained that he was just being "community friendly," trying to provide assistance to members of the community who reached out to him, and that he did not receive any personal benefit from the computer searches. He also acknowledged that those computer searches were in violation of Department guidelines. (Tr. 273-76, 301-02) Accordingly, I find Respondent guilty of Specification 5.

Specification 6 charges Respondent with wrongfully residing within the confines of his assignment, which was the 83 Precinct. Section 203-18 of the Patrol Guide states that no MOS is to be assigned to his resident precinct. Sergeant Orenstein testified that IAB conducted surveillance of Respondent, and observed that he was spending four-to-five nights per week at an apartment within the confines of the 83 Precinct, to which he was assigned. His official residence on file, though, was within another county. (Tr. 117-20, 153, 190-92) Respondent testified that his official residence was, in fact, the one in the other county, and that he maintained that residence and still occasionally stayed there. However, he acknowledged that he also stayed many nights with his girlfriend at her apartment within the 83 Precinct, even though he was assigned there since 2005. (Tr. 276-80, 303-04) The credible evidence has established that Respondent essentially resided within the 83 Precinct in that he slept there four-to-five nights per week, and I find him guilty of Specification 6.

Specification 7 charges Respondent with openly smoking cigars while in uniform on seven occasions, contrary to Section 203-10 (14) of the Patrol Guide. Sergeant Orenstein testified that Respondent was repeatedly observed smoking on duty. (Tr. 120, 193) Respondent

admitted to doing so, explaining that he had been smoking cigars since childhood. With his many years on the job, no one specifically ordered him not to smoke, as long as he was outside. (Tr. 252-53, 291) Even without such direct orders, Respondent's conduct ran afoul of the guidelines, and I find him guilty of Specification 7.

Specification 8 charges Respondent with knowingly associating with tow truck operators and companies reasonably believed to be engaged in criminal activities. It is undisputed that Respondent repeatedly circumvented the Department's tow procedures by directly contacting tow operators to respond to locations. However, as discussed under Specification 4, above, the record has failed to establish, by a preponderance of the credible evidence, that Respondent interacted with these tow operators at a time where he reasonably believed them to be engaged in criminal activities. Accordingly, I find Respondent not guilty of Specification 8.

Specification 9 charges Respondent with making inaccurate and false entries on a police accident report. Specifically, Sergeant Orenstein testified regarding an integrity test that occurred on January 11, 2021. After a staged hit-and-run accident, the motorist informed Respondent that he had been driving when he was struck by another vehicle, and that he had briefly pursued the other vehicle before returning to the scene. Nevertheless, in the Police Accident Report (Dept. Ex. 2), Respondent indicated that the motorist's vehicle had been "parked and unattended" at the time it was struck. (Tr. 120-24, 199-208)

Respondent testified that he did make the false entry in the report. He explained that the motorist had told him he would have a hard time explaining to the owner of the vehicle that he was involved in an accident while driving, and so Respondent decided to help the motorist out by writing that the vehicle had been parked when struck. (Tr. 271-73, 305-06) Since Respondent knowingly made a false entry in the report, I find him guilty of Specification 9.

Specification 10 charges Respondent with failing to render necessary police service on 14 occasions. Specifically, it is alleged that Respondent remained at the tow locations for an extended period of time, and therefore did not respond to other radio calls in a timely manner. Respondent testified that he stayed at the tow locations long enough to make sure that the individuals involved received the service they needed. He explained that if there were a radio call that came over that required his immediate involvement, that he would respond accordingly. (Tr. 258, 286, 306-07) Although there is some concern regarding Respondent lingering at jobs, no specific examples of Respondent responding late to a job were provided. The record has failed to establish, by a preponderance of the credible evidence, that Respondent failed and neglected to render police service on 14 occasions, and I find him not guilty of Specification 10.

Specification 11 charges Respondent with obstructing the license plates on his personal vehicle, while he was operating that vehicle on a public roadway, on approximately 50 occasions. Sergeant Orenstein testified that from IAB's surveillance, it was observed that Respondent repeatedly covered his plates. For instance, at times Respondent obstructed a portion of his plates with magnets, fake digits, or Mickey Mouse ears. (Tr. 128-29, 214)

Respondent testified that he did, in fact, do so, in order to avoid detection by speed cameras and license plate readers. He was looking to avoid speeding tickets on local roads, but did not cover his plates to avoid paying tolls. Respondent also stated that he was concerned about people vandalizing cars belonging to police officers, and so he wanted to make it less obvious that his car was a police vehicle. Respondent acknowledged that his actions were wrong, and insisted that he no longer engages in such practice. (Tr. 287-88, 308-09)

The credible evidence has established that Respondent wrongfully obstructed his license plates on multiple occasions. Accordingly, I find him guilty of Specification 11.

Specification 12 charges Respondent with failing to take police action against unlicensed tow trucks. Sergeant Orenstein testified that Respondent never took action against any tow operators for being unlicensed. (Tr. 129-30, 214-16) Respondent confirmed that other than for enforcement initiatives, he did not take any action against tow operators. He testified, however, that he never actually dealt with a tow operator whom he knew to be unlicensed. (Tr. 285-86, 304-05, 310) Since no credible evidence was presented to the contrary, I find Respondent not guilty of Specification 12.

Specification 13 charges Respondent with failing to take police action on two separate occasions, in that he did not have vehicles towed, in violation of the Rotation Tow procedures. Sergeant Orenstein testified that on May 1, 2020, and January 12, 2021, Respondent responded to scenes which required him to have a vehicle towed, and on neither occasion did he do so. (Tr. 130-35, 216-17) Respondent admitted that he should have had each of the vehicles towed, but he failed to do so. He explained that it was a busy sector, and there did not appear to be any urgency regarding either vehicle, so he bypassed them. (Tr. 284-85, 310-11) Since Respondent's failure to take action was in violation of the Rotation Tow procedures, I find him guilty of Specification 13.

Specification 14 charges Respondent with wrongfully completing a residential mortgage loan application in which he falsely indicated that he intended to use the property as a private residence. Sergeant Orenstein testified that Respondent's mortgage application (Dept. Ex. 3) contained inaccurate information on pages 1 and 3, stating that the property will be a "primary residence." In fact, the property never was used for that purpose, and Respondent never corrected the information. Sergeant Orenstein acknowledged that he has no knowledge as to who actually filled out the application, and that the form submitted into evidence does not contain Respondent's signature. He also conceded that there is no evidence that Respondent

received any benefit by having the property listed as a primary residence; his rate, 4.5%, was not particularly low, and there was no indication that it would have been higher if not for the erroneous information. (Tr. 135-40, 145-50, 217-21)

Respondent acknowledged that he did submit the application, though he testified that he did not fill out the information himself and did not notice any errors; he merely signed the documents where he was told. He noted that page 1 of the application also erroneously listed him as unmarried, an error he similarly did not notice. Respondent further explained that his original intention was to have his elderly parents, who were ill, move into the property, and that he would join them soon after, which is what he told the lender. However, his parents resisted the move, and so a year after the purchase, Respondent got the go-ahead from the lender to rent out the property, which he did for a short time before selling it soon after. He insisted he had no intention of deceiving anyone with the application. (Tr. 280-84, 311-16)

After carefully reviewing the evidence, I am not persuaded that Respondent knowingly submitted false information in his loan application, in violation of Title 18, Section 1001, of the United States Code. No credible evidence was presented that Respondent had a motive to deliberately misstate that the property would be a primary residence, nor was there any indication that he did, in fact, receive a benefit. It is more likely than not that Respondent did not realize that there was an error, just as he did not notice that his marital status was erroneously listed as "unmarried." The record has failed to establish Respondent's guilt by a preponderance of the credible evidence, and I find him not guilty of Specification 14.

PENALTY

In order to determine appropriate penalties, the tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances,

including any aggravating and mitigating factors established in the record. Respondent's employment history also was examined (*See* 38 RCNY § 15-07). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on June 30, 1992, has been found guilty of multiple offenses, including wrongfully using excessive force on an arrestee, as well as repeated violations of the Department's tow procedures.

With respect to the force case, the Disciplinary Matrix provides for a presumptive penalty of 10 days where non-deadly force is used that results in no injury, with an aggravated penalty of termination. The Advocate argues that the aggravated penalty of termination should apply. After carefully reviewing the video footage, in conjunction with the other evidence, I agree. On the one hand, there are mitigating factors present. The arrestee had just been identified as the perpetrator of a stabbing, and he actively resisted the officers' efforts to arrest him. Toward that end, as noted above, a reasonable level of force was appropriate. However, Respondent's actions went well beyond what was reasonable under these circumstances, and the aggravating factors in this case are egregious. This was not a situation where there was brief, inadvertent contact between Respondent and the arrestee during the struggle. Rather, Respondent inexcusably, and without police necessity, placed his foot on the arrestee's head for a prolonged duration. He also gratuitously continued to place his knee into the arrestee's shoulder area even after the arrestee had been placed in handcuffs and was under control. It is unacceptable that Respondent, with approximately 29 years of service, acted in the manner that he did.

Additionally, there are multiple other counts for which Respondent has been found guilty. Among the more significant were the tow procedure violations. Even if Respondent was well-intentioned in circumventing the procedures because he believed doing so was efficient, and

even though he did not gain monetarily from his actions, the sheer volume of such incidents is troubling, and I agree with the Advocate that consecutive aggravated penalties are warranted. Also of concern is the manner in which Respondent repeatedly obstructed the license plates on his personal vehicles, for, among other reasons, to avoid speeding tickets. With such actions, Respondent sought to circumvent the very laws he is tasked with enforcing, and placed himself above the law.

To his credit, Respondent has served the public for almost three decades. That does not, however, excuse him from his recent pattern of behavior, where he repeatedly has ignored the rules and regulations of the Department, sometimes in ways that are egregious. The totality of Respondent's actions, starting with the excessive force misconduct, and including his blatant disregard of the Department's tow procedures, makes Respondent's continued employment with the Department untenable.

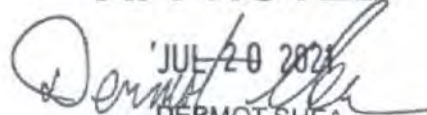
Smoking a cigar is one thing. Stepping on a suspect's head is quite another. That act, in particular, was an affront to the very mission of the Department: to value and respect the dignity of each individual. Taking into account the facts and circumstances in these matters, I recommend that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED



'JUL 20 2021'
DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER JOHN RESTAINO
TAX REGISTRY NO. 902270
DISCIPLINARY CASE NOS. 2021-23645 & 2021-23551

Respondent was appointed to the Department on June 30, 1992. On his last three annual performance evaluations, he received ratings of "Exceeds Expectations" for 2017, 2018 and 2020. Respondent has been awarded three medals for Excellent Police Duty, one medal for Meritorious Police Duty, and one Commendation.

In 2006, Respondent forfeited five vacation days after pleading guilty to moving another member's locker to the stationhouse boiler room. In 2003, Respondent forfeited 19 vacation days and 26 pre-trial suspension days without pay after pleading guilty to (i) accidentally discharging his firearm and failing to inform his patrol supervisor and (ii) failing to properly safeguard his firearm. In 1999, Respondent forfeited 20 vacation days for engaging in conduct prejudicial to the good order, efficiency and discipline of the Department.

Respondent was placed on Level I Force Monitoring from June 26, 2009 to June 26, 2010; that was then upgraded to Level II Force Monitoring, which ended on June 1, 2012. In connection with the instant matters, Respondent was placed on modified assignment on April 23, 2021, and subsequently suspended on June 22, 2021; that suspension remains ongoing.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials